



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

August 22, 1995

Mr. Gene Snelson  
Staff Attorney  
Legal Services Division  
Texas Natural Resource Conservation  
Commission  
P.O. Box 13087  
Austin, Texas 78711-3087

OR95-794

Dear Mr. Snelson:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 32789.

The Texas Natural Resource Conservation Commission (the "commission") received a request for all documents concerning Clearstream Wastewater Systems, Inc., Texas Aerobic and Hydro-Action f/k/a Hydro-flo. The commission claims that one document responsive to this request is excepted from public disclosure under section 552.103(a) of the Government Code. Additionally, the commission claims that a portion of this document is excepted from disclosure under section 552.111. We have considered the exceptions you claimed and have reviewed the document at issue.

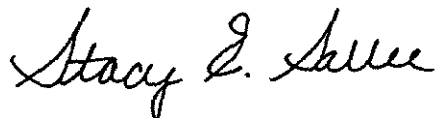
Section 552.103(a), the "litigation exception," excepts from disclosure information relating to litigation to which the state is or may be a party. The commission has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 (1990) at 4. The commission must meet both prongs of this test for information to be excepted under 552.103(a).

You state that there is a potential enforcement issue involving one of the on-site system manufacturers. Under the Health and Safety Code, the commission is the sole authority designated to enforce violations of chapter 366, regulating on-site sewage disposal systems. Health & Safety Code § 366.0922. Additionally, the commission is responsible for referring to the Attorney General for enforcement through civil suit unauthorized discharges of waste into state waters. Water Code §§ 26.121, 26.123, 26.2121. You state that the commission's investigation is not completed, that the subject company is unaware of the investigation, and that release of the information "could seriously impact potential litigation or settlement negotiations." We conclude that litigation is anticipated and that the document submitted to this office for review is related to the potential litigation. Therefore, the commission may withhold this document under section 552.103(a).

We note that when the opposing party in the litigation has seen or had access to any of the information in these records, there is no justification for withholding that information from the requestor pursuant to section 552.103(a). Open Records Decision Nos. 349 (1982), 320 (1982). In addition, the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).<sup>1</sup>

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular record at issue under the facts presented to us in this request and should not be relied upon as a previous determination under section 552.301 regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Stacy E. Sallee  
Assistant Attorney General  
Open Government Section

SES/LRD/rho

Ref.: ID# 32789

---

<sup>1</sup>Section 552.111 also does not except from disclosure information that has previously been publicly disclosed. See Open Records Decision No. 435 (1986) (section 552.111 waived by release of information to public).

Enclosure: Submitted document

cc: Mr. Mason Terry  
Broyles & Pratt  
One Northpoint Centre, Suite 250  
6836 Austin Center Boulevard  
Austin, Texas 78731  
(w/o enclosure)